IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 65

TIMOTHY J. BREEN,

Petitioner,

v.

SELECTIVE SERVICE LOCAL BOARD No. 16, *et al.*,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INDEX

Chronological list 1

Agreed Statement on Appeal Pursuant to Rule 76 of the Federal Rules of Civil Procedure 1

- Statement of the Case 1
- Findings of Fact 4
- Conclusions of Law 4
- Order Appealed From 5
- Points Relied on by the Appellant 5
- Text of letter and Memo on the Draft 8
- Memorandum of decision of U.S. District Court 12

Opinion of U.S. Court of Appeals 22

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CHRONOLOGICAL LIST

February 20, 1968	Complaint filed
March 1, 1968	Motion for Preliminary Injuction filed.
March 8, 1968	Motion to Dismiss filed
March 8, 1968	Hearing before Hon. William H. Timbers
March 13, 1968	Findings of Fact and Conclusions of Law filed by Hon. William H. Timbers
January 10, 1969	Decision of U.S. Court of Appeals for the Second Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

TIMOTHY J. BREEN,
Plaintiff

v. CIVIL ACTION NO. 12,422

SELECTIVE SERVICE LOCAL BOARD NO. 16, BRIDGEPORT CONNECTICUT AND BRIG. GEN. ERNEST E. NOVEY, INDIVIDUALLY AND AS DIRECTOR OF THE SELECTIVE SERVICE SYSTEM FOR CONNECTICUT,
Defendants

AGREED STATEMENT ON APPEAL PURSUANT TO RULE 76 OF THE FEDERAL RULES OF CIVIL PROCEDURE

STATEMENT OF THE CASE

1. Plaintiff is a male citizen of the United States and of the State of Connecticut, 20 years of age. He is and has been a registrant under the Selective Service System of the United States.

2. Defendant Local Board No. 16, Bridgeport, Connecticut, is a duly constituted Local Board of the United States Selective Service System and is and has been the Local Board of the Plaintiff.

3. Defendant Brig. Gen. Ernest E. Novey is and has been the Director of the Selective Service System for Connecticut.

4. Prior to January 8, 1968, the Plaintiff was classified as II-S (student deferment) under the applicable provisions of the Selective Service Act and Regulations, and at all times relevant hereto, the Plaintiff alleges and is prepared to prove that he has been a full-time student at the Berkeley School of Music in Boston, Massachusetts.

5. On November 16, 1967, at a demonstration at the Arlington Street Church in Boston, Plaintiff along with others delivered his Selective Service Registration Card to a clergyman for the sole purpose of protesting United States involvement in the war in Vietnam.

6. In October, 1967, the National Director of the Selective Service System issued the letter and memorandum attached hereto and herein incorporated by reference.

7. On January 9, 1968, Defendant Local Board No. 16 caused to be mailed to Plaintiff a Delinquency Notice (SSS Form 304) informing him that on January 8, 1968, he had been declared delinquent for failure to have his Registration Certificate in his possession. Simultaneously (on January 9, 1968) Plaintiff was reclassified from Class II-S to Class I-A. The Plaintiff's complaint alleges that this action was taken pursuant to the terms of said directive.

8. On January 11, 1968, Defendant Local Board No. 16 caused to be mailed to Plaintiff an order to report for armed forces physical examination (SSS Form 223) on January 29, 1968. Thereafter, at Plaintiff's request, physical examination was postponed to March 4, 1968, and again postponed to a date as yet unspecified.

9. On uncertain date early in February, 1968, Plaintiff appealed to the Selective Service Appeals Board from his

reclassification. No disposition of said appeal has been made to date.

10. Thereafter, on February 20, 1968, Plaintiff instituted this suit asking the Court, *inter alia*, to declare that the designation of Plaintiff as delinquent and his reclassification are null and void; to enjoin Defendants from taking further steps to induct or reclassify him on the basis of his turning in his draft card; to declare Sections 1602.4 and 1642.1–1642.46 of the Selective Service Regulations unconstitutional on their face or as applied in this case; to declare as void the Directive of General Lewis B. Hershey dated October 24, 1967; and for $20,000 damages.

11. On March 1, 1968, Plaintiff obtained a temporary restraining order restraining Defendants, their agents, servants, employees and attorneys, and all persons in active concert or participation with them, from directly or indirectly ordering or implementing the induction and processing of the Plaintiff, by physical examination or otherwise, for induction into the armed services of the United States.

12. On March 1, 1968, Plaintiff filed a Motion for Preliminary Injuction which was ordered set down for hearing on March 8, 1968.

13. On March 8, 1968, Defendants filed a Motion to Dismiss for lack of jurisdiction relying upon 50 App. U.S.C. 460(b)(3) as amended by Public Law 90-40, June 30, 1967, and Plaintiff filed a Motion for Convening of Three-Judge Court and For Extension of Temporary Restraining Order, relying upon 28 U.S.C. 2282.

14. All of the motions referred to in Paragraphs 12 and 13 above came on for hearing and were heard on March 8, 1968, by the Honorable William H. Timbers who, after hearing and argument, dissolved the Temporary Restraining Order and subsequently, on March 13, 1968, filed the attached Memorandum of Decision containing the following findings of fact which are not in dispute and the following conclusions of law.

FINDINGS OF FACT

1. On November 16, 1967, Plaintiff delivered his Selective Service Registration Certificate to a clergyman in Boston, Massachusetts, for return to the Government.

2. On January 9, 1968, Plaintiff's draftboard, located in Bridgeport, Connecticut, mailed him a Delinquency Notice, informing him that on January 8, 1968, he had been "declared delinquent" because of "Failure to have Registration Certificate in your possession."

3. Also, on January 9, 1968, Plaintiff was reclassified from Class II-S (student deferment) to Class I-A.

4. On January 11, 1968 he was ordered to report for a preinduction physical, but at his request, the examination was transferred to Boston, Massachusetts and postponed until March 4, 1968.

5. The Board's actions were entirely by virtue of the draft regulations.

6. The Plaintiff has not exhausted his administrative remedies.

CONCLUSIONS OF LAW

1. 28 U.S.C. 1343 does not confer jurisdiction of this action upon the United States District Court.

2. Section 8(c) of the Military Selective Service Act of 1967, amending Section 10(b) (3) of the Universal Military Training and Service Act (50 App. U.S.C. 460(b) (3)), specifically deprives the United States District Court of whatever jurisdiction it might otherwise have over this action.

3. 28 U.S.C. 2282 does not require the convening of a three-judge district court to consider the jurisdictional question in this case, since this is in order only when a complaint seeks an injunction against enforcement of an Act of Congress and not merely regulations promulgated pursuant thereto.

4. 28 U.S.C. 2201 does not confer jurisdiction but merely creates a remedy where jurisdiction otherwise exists.

5. This action arises under the Constitution and laws of the United States, and 28 U.S.C. § 1331 would generally confer jurisdiction if the matter in controversy exceeded the sum of $10,000 exclusive of interest and costs, unless the Court is otherwise deprived of jurisdiction.

6. The presence of standards explicit in the Board's regulations permits the registrant to know exactly what conduct will result in Board action.

7. In order to invoke a three-judge court under 28 U.S.C. 2282, the plaintiff's complaint must not only raise a substantial question as to the constitutionality of a federal statute but seek an injunction against its enforcement, which the Plaintiff has not done with respect to Section 8(c) of the Military Service Act of 1967.

ORDER APPEALED FROM

"ORDERED that:

(1) Plaintiff's motion for a preliminary injunction is denied.

(2) Plaintiff's motion for the convening of a three-judge district court is denied.

(3) Plaintiff's complaint is dismissed for lack of subject matter jurisdiction, but without costs."

POINTS RELIED ON BY THE APPELLANT

1. The surrender of a Selective Service Registration Certificate is an act of speech and expression which is protected by the First Amendment to the Constitution of the United States.

2. The declaration of the Plaintiff as delinquent by the defendant Board, and its reclassification of the Plaintiff constituted punitive action taken in direct response to his act of expression of protest against the Vietnam war, punitive action which will have a chilling effect on the exercise of First Amendment rights by the Plaintiff and others

similarly situated, as well as inhibiting the future exercise of these rights.

3. The declaration of the Plaintiff as delinquent and his reclassification by the defendant Board were wholly without or contrary to pertinent statutory and constitutional authority and/or exceeded said authority.

4. The declaration of the Plaintiff as delinquent and his reclassification in the manner and for the reasons above stated, i.e., without indictment, arraignment, trial or conviction, constituted a denial of due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

5. The declaration of the Plaintiff as delinquent and his reclassification in the manner and for the reasons above stated violated the guarantees of freedom of speech, assembly, association and the right to petition for redress of grievances, contained in the First Amendment to the United States Constitution.

6. The declaration of the Plaintiff as delinquent and his reclassification in the manner and for the reasons above stated constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

7. The declaration of the Plaintiff as delinquent and his reclassification in the manner and for the reasons above stated constituted discrimination and denial of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

8. Sections 1602.4 and 1642.1 - 1642.46 of the Selective Service Regulations under which Plaintiff was declared delinquent, are unconstitutional on their face and as applied to the Plaintiff, in that they violate the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, *inter alia*, for vagueness, absence of standards, overbreadth, inequality of application, and denial of due process.

9. The Hershey Directive above described purporting to set forth guidelines to local boards, such as defendant, for reclassification of registrants who "abandon" their draft cards or who engage in demonstrations or other acts which are not in the "national interest" is unconstitutional on its face and as applied by the defendant Board against the Plaintiff.

10. The Hershey Directive above described by purporting to combine executive, legislative and judicial powers within a single administrative agency, violates the constitutional principle of separation of powers and is therefore void on its face and as applied.

11. The Hershey Directive above described is in conflict with the statutes, rules and regulations governing selective service procedures, and therefore illegal and unenforceable against the Plaintiff.

12. Section 8(c) of the Military Selective Service Act of 1967, amending Section 10(b)(3) of the Universal Military Training and Service Act (50 App. U.S.C. 460(b)(3)) is unconstitutional on its face and as applied in this case.

13. 28 U.S.C. 2282 requires that the jurisdictional issue in this case be heard by a three-judge district court convened in accordance with 28 U.S.C. 2284.

The parties hereto, through their respective counsel, hereby agree that the foregoing statement of the case contains those facts which they consider to be essential to a decision of the issues involved by the United States Court of Appeals for the Second Circuit.

Lawrence P. Weisman
Emanuel Margolis
Attorneys for Appellant
Jon O. Newman
Attorney for Appellees

The foregoing statement is hereby approved this 15th day of April, 1968.

William H. Timbers
United States District Judge

APPENDIX A

New York Times, Thursday November 9, 1967.

TEXTS OF LETTER AND MEMO ON THE DRAFT

Washington, Nov. 8—Following is the text of a letter, dated Oct. 26, to all members of the Selective Service system from the director of Selective Service Lieut. Gen. Lewis B. Hershey, and of a memorandum, dated Oct. 24, from General Hershey on draft cards:

The Letter

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specified age groups. The complexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health, safety, or interest.

Important facts, too often forgotten or ignored are that the military obligation for liable age groups is universal and that deferments are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations, or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military or naval forces could not by any stretch of the imagination be construed as being in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces, rather than to secure their punishment for disobedience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities, or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in

the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the registrant, classify him anew, and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state

headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV F or 1 Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greater possible extent consistent with sound procedure.

Memorandum

Subject: Disposition of Abandoned or Mutilated Registration Certificate and Notices of Classification

1) Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally issued to a registrant by some other board, it should be forwarded to the state director of selective service, who will forward it to the appropriate local board if within the state director of the board of origin is outside the state.

2) Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class 1 O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(D) If appeal is taken and the registrant is retained in a class available for service by the appeal board, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class 1 O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Filed Mar. 13, 1968]

TIMOTHY J. BREEN,

Plaintiff,

v. Civil No. 12,422

SELECTIVE SERVICE LOCAL BOARD NO. 16, BRIDGEPORT, CONNECTICUT AND BRIG. GEN. ERNEST E. NOVEY, INDIVIDUALLY AND AS DIRECTOR OF THE SELECTIVE SERVICE SYSTEM FOR CONNECTICUT,

APPEARANCES

Lawrence P. Weisman, of Cohen & Wolf, Bridgeport, Conn., and Emanuel Margolis, Stamford, Conn., for plaintiff.

Jon O. Newman, U.S. Atty., Hartford, Conn., for defendants.

MEMORANDUM OF DECISION

ON PLAINTIFF'S MOTIONS FOR A PRELIMINARY INJUNCTION AND FOR THE CONVENING OF A THREE-JUDGE DISTRICT COURT AND ON DEFENDANT'S MOTION TO DISMISS

In this action brought to challenge defendants' right to induct plaintiff into the armed forces, plaintiff has moved for a preliminary injunction to restrain defendants from continuing to process him for induction. Defendants oppose this motion and have moved for dismissal of the complaint on the ground that jurisdiction is lacking in this Court. Because the Court agrees that plaintiff's complaint fails to state a cause of action over which the Court has jurisdiction, plaintiff's motion for a preliminary injunction is denied and the complaint is dismissed. Plaintiff's motion

for the convening of a three-judge district court to consider the issues here presented is also denied.

On November 16, 1967, plaintiff delivered his draft card to a clergyman in Boston, Massachusetts, for return to the government. Allegedly the sole purpose of this act was to protest United States involvement in the war in Vietnam.

The Military Selective Service Act of 1967, 50 App. U.S.C. § 451 et seq., authorizes the President of the United States to prescribe necessary rules and regulations to carry out its provisions. 50 App. U.S.C. § 460(b)(1). Pursuant to this authorization, Sections 1617.1 and 1623.5 of the Selective Service regulations (32 C.F.R. §§ 1617.1 and 1623.5 (1967)) require a person registered and classified by the selective service to have at all times in his personal possession his Registration Certificate and a valid [illegible] of Classification. Both items are commonly refer[illegible] as draft cards. In addition, § 1602.4 of the regulat[illegible] C.F.R. § 1602.4 (1967)) defines a "delinquent" as "a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law." Sections 1642.1-1642.46 (32 C.F.R. §§ 1642.1-1642.46 (1967)) govern the treatment of delinquents. In relevant part they provide that a person failing to perform any duty required under the law may be declared a delinquent by the Board. (32 C.F.R. § 1642.4(a) (1967)). When this is done the Board must send a Delinquency Notice to the registrant setting forth the duty which the registrant has failed to perform. (32 C.F.R. § 1642.4(b) (1967)). Once having declared a registrant delinquent the Board may proceed to reclassify the registrant into Class I-A (32 C.F.R. § 1642.12 (1967)), and having done so, the Board must order him to report for induction before all others, even before volunteers (32 C.F.R. §§ 1642.13 and 1631.7 (1967)).

On January 9, 1968, plaintiff's Draftboard, located in Bridgeport, Connecticut, mailed him a Delinquency Notice, informing him that on January 8, 1968, he had been

"declared delinquent" because of "Failure to have Registration Certificate in your possession." Also on January 9, 1968, plaintiff was reclassified from Class II-S (student deferment) to Class I-A. On January 11, 1968, he was ordered to report for a pre-induction physical, but at his request, the examination was transferred to Boston, Massachusetts and postponed until March 4, 1968.

Plaintiff filed the original complaint in this action on February 20, 1968. On March 1, 1968, plaintiff filed a substituted complaint and the instant motion for a preliminary injunction. Plaintiff also sought and obtained at that time an ex parte temporary restraining order.

A hearing was held on March 8, 1968 on plaintiff's motion for a preliminary injunction. Also filed and heard at that time was plaintiff's motion for the convening of a three-judge district court pursuant to 28 U.S.C. § 2282 to consider the request for a preliminary injunction and for the extension of the temporary restraining order until the three-judge district court could act. In addition, defendants' counsel filed, and the Court heard, a motion to dismiss the complaint for lack of jurisdiction.

At the conclusion of the hearing the Court dissolved the temporary restraining order but otherwise reserved decision on the pending motions.

Plaintiff's complaint avers that the draftboard was without jurisdiction to declare plaintiff a delinquent and to reclassify him, and that its conduct is so doing was unconstitutional. The Board's actions, plaintiff claims, were meant as a penalty and will have the effect of inhibiting the exercise of First Amendment rights by himself and others. Plaintiff also attacks the regulations described above as being unconstitutional on their face and as applied, claiming that they violate the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. Plaintiff further claims that his reclassification into Class I-A simultaneously with the mailing to him of notice that he was "delinquent" and prior to his receipt

of that notice violated Selective Service regulations and due process of law. Finally, plaintiff contends that his reclassification resulted from an improper "directive" concerning reclassification sent by the Director of the Selective Service System, Lt. Gen. Lewis B. Hershey, to draftboards on October 26, 1967.

Plaintiff asks the Court in his complaint to declare that the designation of plaintiff as delinquent and his reclassification are null and void; to enjoin defendants from taking further steps to induct or reclassify him on the basis of his turning in his draft card; to declare the Selective Service regulations referred to above unconstitutional on their face and as applied; and to declare the Hershey "directive" void on its face and as applied. Plaintiff also demands $20,000 in damages.

The threshold question raised by plaintiff's complaint and motion for a preliminary injunction and brought into focus by defendants' motion to dismiss is whether plaintiff states a cause of action over which this Court has jurisdiction.

Plaintiff claims jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and 2201, and asserts that the matter in controversy exceeds the value of $10,000, exclusive of interest and costs, and arises under the Constitution and laws of the United States including 42 U.S.C. §§ 1981 and 1983.

It is clear that 28 U.S.C. § 2201 does not confer jurisdiction but merely creates a remedy where jurisdiction otherwise exists. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950).

Nor is 28 U.S.C. § 1343 of any help to plaintiff. Subsections (1) and (2) of that provision only confer jurisdiction in instances where damages are sought with respect to violations of 42 U.S.C. § 1985; plaintiff does not allege, nor could he properly allege, a violation of that section. Subsection (3) applies only where a state law, statute, ordinance, regulation, custom or usage is involved; none of these is involved here. Subsection (4) confers jurisdiction

where relief is sought under an Act of Congress providing for the protection of civil rights. The only such laws relied upon by plaintiff, 42 U.S.C. §§ 1981 and 1983, require state action; no state action is alleged here. See *Oestereich v. Selective Service System Local Bd. No. 11*, ___ F. Supp. ___ (D. Wyo. Feb. 6, 1968), *aff'd*, ___ F.2d ___ (10 Cir. Feb. 21, 1968).

Nevertheless, this action does arise under the Constitution and laws of the United States and as such 28 U.S.C. § 1331 would generally confer jurisdiction if the matter in controversy exceeded the sum or value of $10,000, exclusive of interest and costs. Although plaintiff alleges that the action involves the requisite jurisdictional amount and seeks to recover $20,000 in damages, a very real question exists whether the necessary amount is in fact in controversy. See *Wolff v. Selective Service Local Bd. No. 16*, 372 F.2d 817, 826 (2 Cir. 1967). *Cf. Oestereich v. Selective Service System Local Bd. No. 11, supra.*

But assuming the requisite jurisdictional amount has been sufficiently demonstrated, the Court is convinced that § 8(c) of the Military Selective Service Act of 1967, amending Section 10(b)(3) of the Universal Military Training and Service Act (50 App. U.S.C. § 460(b)(3)), specifically deprives this Court of whatever jurisdiction it might otherwise have over this action.

Prior to its amendment in June, 1967, Section 10(b)(3) provided that decisions of local draftboards with respect to classifications "shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe." The United States Supreme Court in *Estep v. United States*, 327 U.S. 114, 122-23 (1946) interpreted this to mean that:

> ". . . Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the Courts are not to weigh the evidence to determine whether the classification made by the

> local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Having thus defined the narrow scope of judicial review, the Court proceeded to interpret Congressional intent as to when that review could take place. After *Falbo v. United States,* 320 U.S. 549 (1944), it appeared that a registrant could not even defend a criminal prosecution under the Act on the ground that his Board's classification action was without jurisdiction; rather, review could come only by way of habeas corpus after his actual induction. But in *Estep* the Court held that where all administrative remedies had been exhausted, the defense could be raised in a criminal prosecution for the simple reason that Congress could not have intended to require "the Courts to march up the hill when it is apparent from the beginning that they will have to march down again." *Id.* at 125. The court, however, was careful to point out that it was only this practical reason which resulted in its conclusion, stating that:

> "We do not suggest that because Congress has provided one judicial remedy another should be implied. We may assume that where only one judicial remedy is provided, it normally would be deemed exclusive." *Id.*

Implicit in the Court's reasoning is that Congress, in the context of the Selective Service System, can constitutionally limit judicial review of administrative action to a point in time subsequent to the institution of criminal proceedings or actual induction of the registrant. This principal was again recognized by the court in *Witmer v. United States,* 348 U.S. 375, 377 (1955).

Several courts, however, without questioning Congressional power to provide otherwise, have held that Section 10(b)(3) did not deprive them of jurisdiction to review classification prior to the exhaustion of administrative

remedies and the institution of criminal proceedings.

Most notable of these cases was *Wolff v. Selective Service Local Bd. No. 16, supra,* a decision by the Court of Appeals for this Circuit. The plaintiff in that case was attempting to challenge his delinquency status and reclassification which resulted from his participation in demonstrations against United States involvement in Vietnam. Judge Medina, having found that Section 10(b)(3) did not deprive the court of jurisdiction, then held that the facts of the case warranted the court's setting aside its own doctrines of justiciability and exhaustion of administrative remedies.

Of particular relevancy was the court's finding that the Board's action was completely without authority of any regulation and as such constituted a "chilling effect" upon the exercise of "fragile and sensitive" constitutional rights within the purview of *Dombrowski v. Pfister,* 380 U.S. 479 (1965). *Id.* at 824. The facts of the instant case are, of course, quite different from those in *Wolff.* Here the Board's actions were entirely by virtue of regulations. The existence of a standard permits the registrant to know exactly what conduct will result in Board action and as such, the far-reaching "chilling effect" feared by the court in *Wolff* is non-existent. Thus even if the first premise of *Wolff,* that Section 10(b)(3) did not deprive this Court of jurisdiction, were still valid, the Court would feel compelled in this instance to decline to intervene until plaintiff had completely exhausted his administrative remedies.

But that first premise of *Wolff* does not have the force of authority which it would otherwise have for this Court in view of Congressional action taken since that decision. That action was the amendment of Section 10(b)(3) in June, 1967 by Section 8(c) of the Military Selective Service Act of 1967 so as to read as follows:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12

> of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant." 50 App. U.S.C. § 460(b)(3)

Whatever doubt there was as to Congressional intent concerning the former Section 10(b)(3) has thus now been eliminated.

Plaintiff aruges that Congress merely intended to codify such cases as *Wolff.* That just the opposite is true is plainly expressed by the report of the Armed Services Committee of the House of Representatives with respect to the amendment:

> "The committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such a judicial review until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order. In view view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle. The committee was prompted to take this action since continued disregard of this principle of the law by various courts could seriously affect the administration of the Selective Service System." H. Rep. No. 267, 90th Cong. 1st Sess., 7 U.S. Cong. News 1489 (1967)

It is therefore clear that because plaintiff has not exhausted his administrative remedies and has not yet been ordered to report for induction, this Court lacks jurisdic-

tion to entertain plaintiff's complaint. *Oestereich v. Selective Service System Local Bd. No. 11, supra; Carpenter v. Hendrix,* ___ F. Supp. ___ (N.D. Ga. Nov. 14, 1967) (36 U.S. Law Week 2349); *Moskowitz v. Kindt,* 273 F. Supp. 646 (E.D. Pa. 1967).

In view of *Estep v. United States, supra,* and *Witmer v. United States, supra,* plaintiff's claim that Congress cannot constitutionally force a registrant to await criminal proceedings or actual induction to test the validity of his classification is without merit. Whether the amendment intends to preclude the use of habeas corpus and, if so, whether it would therefore be unconstitutional, is not in issue here as plaintiff has not yet been inducted into the armed services and is not bringing this action upon a petition for a writ of habeas corpus. *Moskowitz v. Kindt, supra,* at 648-49.

Plaintiff has moved for the convening of a three-judge district court pursuant to 28 U.S.C. § 2282 and contends that a single judge is without power even to dismiss the complaing for lack of jurisdiction. First, assuming there were federal court jurisdiction, 28 U.S.C. § 2282 requires the convening of a three-judge district court only when a complaint seeks an injunction against the enforcement of an Act of Congress and not when the injunction is sought against the enforcement of regulations promulgated pursuant to a general authorization contained therein. *Sardino v. Federal Reserve Bank of New York,* 361 F.2d 106, 113-116 (2 Cir. 1966). Secondly, it is not only within the power of, but it is incumbent upon, the single judge to whom the application is made to determine whether there is any basis for federal jurisdiction. *Cf. Idlewild Liquor Corp. v. Epstein,* 370 U.S. 713, 715 (1962). If in the course of making that determination, the construction and constitutionality of a federal statute is drawn into question, as plaintiff attempted to do here with respect to Section 8(c) of the Military Selective Service Act of 1967, the Court is not required by 28 U.S.C. § 2282 to halt its determination and convene a three-judge district court to con-

sider the matter. Not only must the complaint on its face raise a substantial question as to the constitutionality of a federal statute but it must also seek an injunction against its enforcement, neither of which is done by plaintiff's complaint with respect to Section 8(c) of the Military Selective Service Act of 1967. See, *Flemming v. Nestor*, 363 U.S. 603, 606-08 (1960). Therefore, plaintiff's motion for the convening of a three-judge district court must be denied.

ORDER

ORDERED that:

(1) Plaintiff's motion for a preliminary injunction is denied.

(2) Plaintiff's motion for the convening of a three-judge district court is denied.

(3) Plaintiff's complaint is dismissed for lack of subject matter jurisdiction, but without costs.

Dated at New Haven, Connecticut, this 13th day of March, 1968.

/s/ William H. Timbers
Chief Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 47—September Term, 1968.

(Argued September 17, 1968 Decided January 10, 1969.)

Docket No. 32345

TIMOTHY J. BREEN,

Plaintiff-Appellant,

—v.—

SELECTIVE SERVICE LOCAL BOARD No. 16, Bridgeport, Connecticut and BRIG. GEN. ERNEST E. NOVEY, Individually and as Director of the Selective Service System for Connecticut,

Defendants-Appellees.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal by a Selective Service registrant, who had held a student deferment and was reclassified 1-A because of delinquency for failing to have a registration certificate in his possession, from an order of the District Court for Connecticut, William H. Timbers, *Chief Judge*, dismissing for want of jurisdiction a complaint seeking to enjoin his induction. Affirmed.

EMANUEL MARGOLIS, Stamford, Conn. (Lawrence P. Weisman, Bridgeport, Conn.), *for Appellant.*

JON O. NEWMAN, United States Attorney, Hartford, Conn., *for Appellees.*

FRIENDLY, *Circuit Judge*:

Plaintiff Breen, a 20-year old resident of Connecticut, is a registrant under the Selective Service System. He had held a II-S (student) deferment, 50 U. S. C. App. §456 (h)(1), 32 C. F. R. §1622.25, because of being an undergraduate at the Berkeley School of Music in Boston. In mid-November, 1967, he delivered his Selective Service Registration Certificate to a clergyman in Boston for the purpose of protesting United States involvement in the war in Vietnam. On January 9, 1968, his Local Board mailed him a notice, 32 C. F. R. §1642.4(b), that he had been declared a delinquent for failure to have the Certificate in his possession as required by 32 C. F. R. §1617.1. At the same time the Local Board reclassified him from Class II-S to Class 1-A because of his delinquency, pursuant to 32 C. F. R. §1642.12, which authorizes such reclassification "regardless of other circumstances." These actions of the Board were in line with a memorandum and a letter dated respectively October 24 and 26, 1967, from the Director of Selective Service. The Local Board ordered Breen to report for a physical examination on January 29 but subsequently postponed this. Apparently Breen did not seek a personal appearance under 32 C. F. R. §1642.14. However, he appealed his reclassification under that same section.

In February 1968 Breen brought this action in the District Court for Connecticut, seeking a judgment that the

declaration of his delinquency and his reclassification were null and void, an injunction against his induction into the armed forces, and $20,000 damages. Although jurisdiction was predicated on 28 U. S. C. §§1331, 1343 and 2201, only the first could afford a basis.[1] The Government moved to dismiss the complaint and Breen to have a three-judge court convoked. Believing that the court was deprived of jurisdiction by §8(c) of the Military Service Act of 1967, 81 Stat. 104, which amended §10(b)(3) of the Selective Service Act, 50 U. S. C. App. §460(b)(3), by including the provision set forth in the margin,[2] Chief Judge Timbers, in a considered opinion, granted the Government's motion and denied Breen's.

After the decision of the district court, Breen's administrative appeal was denied and he was ordered to report for induction, but the order was stayed pending the determination of this appeal. When the appeal reached us in September, we deferred decision because the Supreme Court had set for early argument *Oestereich* v. *United States*, No. 46, October Term, 1968, which also involved the applicability and validity of the amendment to §10(b)(3) although in a somewhat different context.

We now have the benefit of the Court's decisions in *Oestereich*, —— U. S. —— (1968), 37 L. W. 4053, holding the amendment inapplicable to a claim by an exempt theo-

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1 Plaintiff sought to meet the requirement of jurisdictional amount by a conclusory statement that the matter in controversy exceeds the value of $10,000 exclusive of interest and costs. See *Wolff* v. *Local Board No. 12*, 372 F. 2d 817, 826 (2 Cir. 1967). The Government has made no point about this, nor shall we.

2 No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction . . . .

logical student that the delinquency regulations could not be applied to him, and in *Clark* v. *Gabriel*, —— U. S. —— (1968), 37 L. W. 3217, holding the amendment valid and applicable to the rejection of a claim of conscientious objection. While neither decision reads precisely on the issue here tendered, applying their teaching as best we can, we affirm the judgment of the district court.

Oestereich, a student at a theological school preparing for the ministry, who had been declared delinquent for having turned in his registration certificate, was entitled under §6(g) to an exemption from military service and not merely to a deferment of his obligation. The element critical to the holding that the amendment to §10(b)(3) was inapplicable in his case was the Court's view that:

> Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption.

Since the Board's action in depriving a divinity student of the exemption which was his "statutory right" was therefore "blatantly lawless" and "involved a clear departure by the Board from its statutory mandate," to read the statute as forcing Oestereich to choose between induction and a criminal prosecution before he could vindicate his rights would be "to construe the Act with unnecessary harshness."

In contrast, §6(h)(1) of the Selective Service Act, 50 U. S. C. App. §456(h)(1), dealing with the deferment of undergraduates, on which Breen relies, directs:

> Except as otherwise provided in this paragraph, the President shall, *under such rules and regulations as*

> *he may prescribe,* provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. (Emphasis supplied.)

While 32 C. F. R. §1622.25 provides for the placing of undergraduates in Class II-S, §1642.12, promulgated by the President on July 4, 1967, Ex. Order No. 11360, 32 F. R. 9794, authorizes their removal from that classification on a declaration of delinquency. Arguments that this provision offends the "Except as otherwise provided" language with which §6(h)(1) begins or that the "rules and regulations" must be relevant to the deferment (e.g., the obtaining of certain grades), collide with the fact that in the last sentence of §6(h)(1)[3] Congress expressly recognized the long-standing provision for reclassification and early induction of delinquents with respect to student deferments. This is clear evidence that Congress did not suppose that reclassification pursuant to the delinquency regulations would violate the provision of §6(h)(1) that

> Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action.

The conflict between statute and regulations that arose in *Oestereich* is therefore not present here.

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3 The congressional committee reports on the extensive amendments to the Selective Service Act in 1967 explicitly take note of the existence of the delinquency regulations. S. Rep. No. 209, 90th Cong., 1st Sess. 3, 6; H. Rep. No. 267, 90th Cong., 1st Sess. 17.

We consequently find no sufficient justification in this case for denying to the words of the 1967 amendment to §10 (b)(3), see fn. 2, the meaning which they so plainly have and which the Committee reports, set forth in the dissenting opinion in *Oestereich*, —— U. S. at ——, show they were intended to have. As recognized in Mr. Justice Harlan's concurring opinion in *Oestereich*, —— U. S. at ——, fn. 7, "Section 10(b)(3) was likely precipitated by the Second Circuit's well publicized decision in Wolff v. Selective Service Local Board No. 16, 372 F. 2d 817 (1967)." See, to the same effect, the dissenting opinion of Mr. Justice Stewart, joined by Justices Brennan and White, —— U. S. at —— & fn. 5. If Congress meant to withhold the preinduction review we had granted in *Wolff* to students enjoying deferments who had been declared delinquent for acts not within the regulations, it surely must have intended to do this where, as here, there has been an undisputed violation of 32 C. F. R. §1617.1 requiring continued possession of a certificate—a requirement which the Supreme Court has characterized as serving "a legitimate and substantial purpose in the system's administration." *United States* v. *O'Brien*, 391 U. S. 367, 378 (1968). As said by Mr. Justice Douglas, the author of *Oestereich*, in his concurring opinion in *Clark* v. *Gabriel, supra*, —— U. S. at ——, "it takes the extreme case where the Board can be said to flout the law, as it did in Oestereich v. Selective Service, ante, p. ——, to give preinduction review of its actions."

The argument that the Board "flouts the law" so as to require preinduction review of its actions whenever its proceedings are claimed to violate the Constitution, although these were consistent with the Selective Service Act, was rejected *sub silentio* in *Gabriel*. Although the opinion in that case did not specifically refer to any constitutional

issues raised, the Government's Jurisdictional Statement shows that Gabriel asserted violations of First and Fifth Amendment rights, and also apparently claimed that the Selective Service system involves unconstitutional delegations of the legislative, executive, and judicial powers. The Court could readily have passed only on such of Gabriel's points as did not require inquiry into the findings of fact or exercise of discretion of the individual Board. Instead, acting under §10(b)(3), it refused to consider any of Gabriel's claims, saying

> We find no constitutional objection to Congress' thus requiring that assertion of a conscientious objector's claims such as those advanced by appellee be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an available remedy, or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to induction.

We do not intimate that Breen's claims that his reclassification because of the return of his certificate violated his First Amendment rights to protest, as to which see *United States* v. *O'Brien, supra,* and his Fifth Amendment rights to adequate standards and notice, are not substantial. We hold only that they must be asserted in the ways to which Congress plainly limited him, to wit, refusal to submit to induction or post-induction habeas corpus.

It remains only to add that the decision that a three-judge court was not required was correct. Breen did not seek an injunction "restraining the enforcement, operation or execution" of §10(b)(3), 28 U. S. C. §2282; rather the Government raised that statute as a bar. See *Int'l Ladies Garment Workers Union* v. *Donnelly,* 304 U. S. 243, 251

(1938); *Flemming* v. *Nestor*, 363 U. S. 603 (1960); *Petersen* v. *Clark*, 285 F. Supp. 698 (N. D. Calif. 1968).

Affirmed.

FEINBERG, *Circuit Judge* (dissenting):

I respectfully dissent.

The underlying issue in plaintiff's action is whether the Selective Service delinquency procedure, as applied to a registrant who is delinquent because he protests national policy, is proper. It is now clear that such delinquency reclassification is not lawful if the registrant so treated happens to qualify for a statutory exemption. In *Oestereich* v. *Selective Service System Local Board No. 11*, 37 U. S. L. W. 4053 (U. S. Dec. 16, 1968), five members of the Supreme Court characterized use of the delinquency procedure in that situation as "basically lawless," making the local draft boards "free-wheeling agencies meting out their brand of justice in a vindictive manner."[1] A sixth member

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1 We can find no authorization for that use of delinquency. Even if Congress had authorized the Boards to revoke statutory exemptions by means of delinquency classifications, serious questions would arise if Congress were silent and did not prescribe standards to govern the Boards' actions. There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Boards free-wheeling agencies meting out their brand of justice in a vindictive manner.

Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption. The Solicitor General confesses error on the use by Selective Service of delinquency proceedings for that purpose.

We deal with conduct of a local Board that is basically lawless. It is no different in constitutional implications from a case where induction of an ordained minister or other clearly exempt person is ordered (a) to retaliate against the person because of his political views or (b) to bear down on him for his religious views or his racial attitudes or (c) to get him out of town so that the amorous interests of a Board

of the Court, Mr. Justice Harlan, concurred in the holding that the delinquency reclassification in that case was improper and characterized as "nonfrivolous" the arguments made there that the entire procedure was unconstitutional "punishment." *Id.* at 4056 n. 6. Therefore, there can be no doubt that the basic question that plaintiff seeks to raise—whether he was ordered inducted by an illegal procedure—is substantial, even though he has not yet been able to convince a court that it should decide the issue.

The precise question before us is whether plaintiff is now entitled to such a judicial forum without making the harsh and risky choice of defying induction (and inviting criminal prosecution) or of submitting to induction and attempting to obtain habeas corpus. In *Oestereich*, the Court construed section 10(b)(3) of the Military Selective Service Act of 1967, 50 U. S. C. App. §460(b)(3), to relieve the registrant of that dilemma; in *Clark* v. *Gabriel*, 37 U. S. L. W. 3217 (U. S. Dec. 16, 1968), it did not. As an inferior federal court, we must attempt to follow the teaching of these cases, as my brothers point out. However, doing so leads me to a contrary result.

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member might be better served. See *Townsend* v. *Zimmerman*, 257 F. 2d 376. In such instances, as in the present one, there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved. The case we decide today involves a clear departure by the Board from its statutory mandate. To hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness. As the Solicitor General suggests, such literalness does violence to the clear mandate of §6(g) governing the exemption. Our construction leaves §10(b)(3) unimpaired in the normal operations of the Act. [37 U. S. L. W. at 4054.]

It is true that *Oestereich* involved an *exemption* for divinity students, which the local board "blatantly" disregarded, while here plaintiff relies on a *deferment* for undergraduates. But that deferment is quite plain in the statute; section 6(h)(1) of the Military Selective Service Act of 1967, 50 U. S. C. App. §456(h)(1), provides:

> Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under

> the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

Thus, Congress has explicitly made it national policy to provide deferments for "persons satisfactorily pursuing a full-time course of instruction at a college," which continue until the student reaches the age of 24 or obtains his degree, unless his studies are unsatisfactory. Moreover, such deferments are not to be "substantially restricted or terminated" unless the President finds "that the needs of the Armed Forces require such action." This is about as clear a statement of congressional intent as you can get, made all the more emphatic by its appearance in the Selective Service Act for the first time in the 1967 amendments.[2]

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2 See Davis & Dolbeare, Selective Service: Present Impact and Future Prospects, 1967 Wis. L. Rev. 892, 909; Note, Changes in the Draft: The Military Selective Service Act of 1967, 4 Colum. J. L. & Soc. Prob. 120, 136-37 (1968). Prior to 1967, the President was authorized —not required—to provide for such deferment of students as was "found to be necessary to the maintenance of the national health, safety, or interest," former 50 U. S. C. App. §456(h); by regulation the deferment of individual students was left to the discretion of the local board, see former 32 C. F. R. §1622.25.

I cannot satisfactorily distinguish this case from *Oestereich*. Each involves a clear statutory grant by Congress to a specified class of registrants of the right not to be inducted into military service, although in this case the right is referred to as a deferment rather than an exemption. The Court's observations in *Oestereich* are therefore equally apt here:

> Since the exemption granted divinity students is plain and unequivocal and in no way contested here, and since the scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards, we conclude that pre-induction judicial review is not precluded in cases of this type. [Footnote omitted.]

37 U. S. L. W. at 4054-55. Indeed, the applicability of the reasoning of *Oestereich* to the situation here was clearly foreseen by the three dissenting Justices in that case.[3]

In reaching a contrary view, my brothers rely on that portion of section 6(h)(1) which qualifies the statutory command for student deferments as subject to "such rules and regulations as [the President] may prescribe." But

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3 The dissenters wrote, 37 U. S. L. W. at 4058 n. 9:

> The Court seems to limit its holding to statutory "exemptions"; yet "deferments" may just as "plainly" preclude a registrant's induction. See, *e.g.*, 50 App. U. S. C. §456(h)(1) (Supp. III, 1968); 32 CFR §1622.25 (1968) (full-time college students).

Cf. *Kimball* v. *Selective Serv. Local Bd. No. 15*, 283 F. Supp. 606, 608 (S. D. N. Y. 1968) (enjoining induction of plaintiff): "It is submitted that the distinction attempted to be drawn by the Government between an 'exemption' under §456(g) and a 'deferment' under §456(h) is one without legal significance." A notice of appeal from a similar subsequent order involving a different plaintiff in the same case has been filed in this court. No. MR 2219, 2d Cir., Aug. 13, 1968.

that clause is itself qualified by the introductory phras in the first sentence, "Except as otherwise provided in thi paragraph." The paragraph does, as already noted, other wise provide both that student deferments shall continu until the occurrence of specified events and also that suc deferments shall not be "substantially restricted" by th President unless he finds that "the needs of the Arme Forces" require it.[4] The former limitation is not relie on by the Government. As to the latter, I see no suc finding in Executive Order No. 11360, 32 Fed. Reg. 978 9794 (1967), relied on by the majority. Moreover, it woul seem that authority to promulgate "rules and regulations would extend only to those which would sensibly be relevan to the deferment, e.g., the obtaining of certain grades referred to by the majority, the furnishing of proof of bon fide undergraduate status, or the definition of a "full-time student. My brothers also rely on the fleeting reference i the last sentence of section 6(h)(1) to "delinquents," whic does not deserve the significance attributed to it. The Selec tive Service System made a similar argument in *Oestereic* without success. Finally, the fact that the requirement c continued possession of a registration certificate serves a legitimate purpose is beside the point. The underlying issu is whether the proper agency to "punish" transgressions c that rule is a court, under traditional safeguards, or an un fettered draft board, consisting of "part-time uncom pensated members," in a proceeding essentially "non judicial." 37 U. S. L. W. at 4056 (Harlan, *J.*).

The foregoing analysis of *Oestereich* and its effect o this case is strengthened by close examination of the Court'

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4 See Note, Changes in the Draft: The Military Selective Service Ac of 1967, 4 Colum. J. L. & Soc. Prob. 120, 140 n. 158 (1968).

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decision on the same day in *Clark* v. *Gabriel, supra.*[5] In that case, the registrant's draft board rejected his claim to classification as a conscientious objector; the Court held that section 10(b)(3) prevented review until after induction or criminal prosecution. The Court in *Gabriel* distinguished *Oestereich* as follows, 37 U. S. L. W. at 3217:

> In Oestereich the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being "sustained by the local board." . . .
>
> Here the board has exercised its statutory discretion to pass on a particular request for classification, "evaluating evidence and . . . determining whether a claimed exemption is deserved." Oestereich v. Selective Service System Local Board No. 11, ante, p. ——. A local board must make such a decision in respect of each of the many classification claims presented to it. To allow pre-induction judicial review of such determinations would be to permit precisely the kind of "litigious interruptions of procedures to provide

5 This was a *per curiam* opinion by four members of the Court. Mr. Justice Douglas filed a separate concurrence, the dissenters in *Oestereich* concurred for the reasons they expressed in that case, and Mr. Justice Black thought that probable jurisdiction should be noted and the case set down for argument.

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necessary military manpower" . . . which Congress sought to prevent when it enacted §10(b), (3).

The differences between this case and *Gabriel* are clear. In *Gabriel,* the registrant's right to his classification depended "upon an act of judgment by the board." No such discretionary decision is involved here. Section 6(h)(1) contains no similar condition that a registrant's claim for student deferment be "sustained by the local board"; in any event, there is no doubt that Breen was a full-time student at a college. Therefore, whether the registrant in *Gabriel* raised constitutional issues, as the majority states, is not crucial. What is more significant is that in *Gabriel,* unlike both this case and *Oestereich,* the action of the draft board "inescapably involves a determination of fact and an exercise of judgment."

In short, I believe this case is governed by the reasoning in *Oestereich.* If the registrant there was entitled before induction to a judicial hearing on his claims, he should get no less here.[6] Accordingly, I would remand to the District Court for Connecticut for that purpose.

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6 It should be noted that the same result would be reached if the approach of Mr. Justice Harlan in *Oestereich* were adopted. Plaintiff here, like the plaintiff in *Oestereich,* contends "that the procedure employed by the board is invalid on its face." 37 U. S. L. W. at 4055. Similarly, such a claim

> does not invite the court to review the factual and discretionary decisions inherent in the "classification or processing" of registrants and does not, therefore, present opportunity for protracted delay. . . . [I]t presents an issue beyond the competence of the Selective Service boards to hear and determine.

Id. at 4055-56.

Supreme Court of the United States

No. 1144 ---- , *October Term, 19* 68

Timothy J. Breen,

Petitioner,

v.

Selective Service Local Board No. 16,
Bridgeport, Connecticut, et al.

ORDER ALLOWING CERTIORARI. Filed April 28 ---------- , 19 69.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ---------- Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.